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Pews, Sidelines, and Locker Rooms:
Moment of Silence Policy is the "Hail Mary" to Achieve Constitutionality of Prayer in Public-School Athletic Contests

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Religion and the First Amendment
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I. Introduction

It is a crisp, autumn Friday night in the United States. We eagerly watch as the high school football game is about to begin.

The players kneel before their game to say a prayer for good luck and safety. It may sound like this:

> O God, you gave us bodies—
> as well as minds and hearts—
> with which to praise and worship you.
> Our sports and exercises are a fitting use of gifts
> and talents you have given us.
> Bless our workouts and the games we play,
> and those with whom we exercise or compete.
> Give us strength, endurance, courage
> and agility as we compete or train.
> Keep us safe and healthy as we celebrate
> our physical and mental skills in sport.[1]

Throughout the game, as the players score, they may say a quick celebratory prayer in the endzone or kiss their hand and raise their pointer finger up to the sky expressing, gesturing, and symbolizing "Thank you, God." With two minutes left in the game and a tied score, the quarterback for the home team throws a "Hail Mary" pass[2] to win the game.

Religion and sports are inextricably linked. There is a long, intertwined history between religion and sport. However, while there is widespread recognition of the influence that religion has in sport, the history between the two areas is not without conflict. Pre-game "rituals," such as prayers and gestures of worship, are regularly held before and during athletic contests, particularly football games, in the United States.[3] Pre-game prayers are held in public school locker rooms or

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[1] *A Prayer for Those Involved in Sports*, MARQUETTE UNIVERSITY, https://www.marquette.edu/faith/prayers-sports.php.

[2] *Hail Mary Pass*, MERRIAM-WEBSTER ("a long forward pass in football thrown into or near the end zone in a last-ditch attempt to score as time runs out — often used figuratively."), https://www.merriam-webster.com/dictionary/Hail%20Mary (last visited November 26, 2019).

[3] Gill Fried & Lisa Bradley, *Applying the First Amendment to Prayer in A Public University Locker Room: An Athlete's and Coach's Perspective,* 4 MARQ. SPORTS L.J. 301 (1994).

on sidelines prior to the start of an athletic contest. Absent a complaint by a concerned student-athlete or parent to the coach, team, or school, these rather routine rituals are rarely met with resistance and often undertaken without any thought to its legal consequences. However, throughout the twentieth and twenty-first century, courts, including the Supreme Court of the United States, were replete with constitutional challenges addressing the extent to which religious devotional practices should be permitted in the government sector and in public schools.[4] In particular, and as the central focus of this paper, there are the constitutional challenges addressing the extent to which religious devotional prayer should be permitted in public-school athletics. In resolving these challenges, the Supreme Court has held that such pre-game prayers and prayer policies may violate the Establishment Clause.[5] As a result, the Supreme Court has limited the role religion plays in public-school athletic contests.

The First Amendment protects student-athletes by providing them the right to be free from state imposed religious indoctrination as well as the right to free exercise and free speech as it relates to religious devotional prayer. In some circumstances, this constitutional protection is also balanced against a coach's right to effectively motivate their team without having every word scrutinized as a government actor. The Religion Clauses – the Establishment Clause and the Free Exercise Clause – are incorporated against the states through the Due Process Clause of the

[4] *See* McGowan v. Maryland, 366 U.S. 420, 453 (1961) (holding that a state's "Sunday Closing Laws" were secular in nature and did not violate the Establishment Clause because they gave the citizens a secular day of rest); Marsh v. Chambers, 463 U.S. 783, 794 (1983) (holding that the state legislature's practice of opening each legislative sessions with a prayer delivered by a chaplain paid from state funds did not violate the Establishment Clause); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (holding that a statute which forbade an employer's dismissal of an employee who refused to work on his Sabbath violated the Establishment Clause of the First Amendment of the United States Constitution); Town of Greece v. Galloway, 572 U.S. 565, 566-67 (2014) (holding that the town's practice of opening board meetings with a prayer did not violate the Establishment Clause; the First Amendment did not require legislative prayer to be nonsectarian, nor was the town required to search beyond its borders for non-Christian prayer givers in order to achieve religious balancing).

[5] *See* Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) (holding that a policy permitting student-led, student-initiated prayer at high school football games violated the Establishment Clause).

Fourteenth Amendment.[6] There is a symbiotic tension between the Religion Clauses.[7] The Establishment Clause "protects every individual's right to freedom of belief while the Free Exercise Clause protects the individual's freedom to practice his [or her] religion."[8] Although these clauses may appear to be straightforward, courts have had substantial difficulty deciding where to draw the line between permissible religious actions and those that violate the Religion Clauses.[9] In fact, the Supreme Court has recognized that the language of the Religion Clauses is "at best opaque, particularly when compared with other portions of the amendment."[10]

Historically, one of the main issues under the Establishment Clause is the separation of church and state in the realm of education, specifically in the public-school system.[11] Accordingly, courts have widely scrutinized religion in public schools under the Establishment Clause.[12] Courts remain unconcerned with the actions of individual students, such as students voluntarily praying anytime throughout the school day.[13] However, the free exercise rights guaranteed by the Constitution are violated when government actors, such as school administrators, sponsor a specific religious practice of prayer.[14] Accordingly, the Supreme Court has determined that the

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[6] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof …"); Everson v. Bd. of Educ., 330 U.S. 1,18 (1947) (holding that a New Jersey law providing public payment of the costs of transportation to and from parochial Catholic schools is not in violation of the Establishment Clause).

[7] *See Everson*, 330 U.S. at 50 (Rutledge, J., dissenting) (stating that establishment and free exercise "were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom."); Tilton v. Richardson, 403 U.S. 672, 677 (1971) (recognizing an internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause).

[8] Malnak v. Yogi, 440 F. Supp. 1284, 1316 n.20 (D.C. N.J. 1977).

[9] *See* Lemon v. Kurtzman, 403 U.S. 602, 624 (1971) ("The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn."); *see also* Sara S. Davis, *Separation of Church and State: Expanding the Purpose Prong of the Lemon Test*, 53 FLA. L. REV. 603 (2001).

[10] *Lemon*, 403 U.S. at 612.

[11] DAVID M. ALEXANDER & KERN ALEXANDER, AMERICAN PUBLIC-SCHOOL LAW 202 (5th ed. 2001).

[12] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

[13] *Santa Fe*, 530 U.S. at 313.

[14] *Id.; see also* Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (an oversight from school administration can be deemed endorsement, encouragement, or participation); Edwards v. Aguillard, 482 U.S. 578 (1987) (teachers should be prohibited from participating in religious exercises because students view teachers as role models).

free exercise of religion will not supersede the fundamental limitations imposed by the Establishment Clause in governmental settings.[15] The relationship between the Establishment Clause and the Free Exercise Clause is made even more complicated when student-athletes and coaches exercise their religious beliefs by praying at a public-school athletic contest.

Prayer in public-school athletic contests may sometimes conflict with the Religion Clauses because sidelines and locker rooms serve as modern-day pews for some student-athletes and coaches. In most cases, the player's interest in practicing his or her religion is weighed against a coach's right to motivate his or her team or a mandated school prayer policy. These interests and rights must be examined in light of any action undertaken by a government or government actor to determine if those actions constitute the establishment of religion by the state or the infringement of a player's right to freely exercise religious devotional prayer. Despite the seeming discord between the Religion Clauses, both free exercise and non-establishment can be achieved through the proper implementation of a moment of silence policy in public-school athletic contests. A moment of silence would be voluntary, uncoerced, and neutral for the secular purpose of furthering individualized reflection prior to the start of public-school athletic contests. This practice would not violate the Free Exercise Clause as it neither impinges on a student-athlete's rights nor curtails a coach's right to effectively motivate his or her team. Moreover, this practice would not violate the Establishment Clause as such a policy cannot be misconstrued as endorsing a particular religious practice.

This paper will examine the history of religion in sport; the framework and application of the Establishment Clause, Free Exercise Clause, and its free speech implications, especially in the context of religious devotional prayer in public schools; and the solution to achieving both free

[15] *Lee*, 505 U.S. at 587.

exercise and non-establishment through the proper implementation of a moment of silence policy in public-school athletic contests.

II. Muscular Christianity

At the end of the nineteenth century, the convergence of religion and organized sports became integral to the American lifestyle with the movement referred to as "Muscular Christianity." Muscular Christianity is simply defined as the "Christian commitment to health and manliness."[16] The origins of muscular Christianity can be traced back to Paul the Apostle and the New Testament, which affirms manly exertion[17] and physical health.[18] However, this ideology was not always a central tenet of Christianity.

The Muscular Christianity movement originated in nineteenth century Victorian England amidst industrialization and urbanization.[19] This theological offshoot proposed the idea that male physical perfectibility was a paradigm for religion and social order.[20] The term "Muscular Christianity" most likely first appeared as a literary term in an 1857 English review of Charles Kingsley's novel *Two Years Ago* (1857).[21] Much of Kingsley's work reflected his commitment to the political enfranchisement of the working class during the Industrial Revolution in Great Britain.[22] One year later, the same phrase was used to describe *Tom Brown's School Days*, an 1856 novel about life at "Rugby School" by fellow Englishman Thomas Hughes.[23] Hughes wrote,

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[16] *See generally* Clifford Putney, *Muscular Christianity*, INFED.ORG, (2003). www.infed.org/christianeducation/muscular_christianity.htm.
[17] *Mark* 11:15 (English Standard) ("When they arrived in Jerusalem, Jesus entered the temple courts and began to drive out those who were buying and selling there. He overturned the tables of the money changers and the seats of those selling doves.").
[18] 1 *Cor*. 6:19-20 (English Standard) ("Do you not know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God? You are not your own; you were bought at a price. Therefore, honor God with your bodies."); *see also* Putney, *supra* note 16.
[19] *See* Phillip J. Sweitzer, *Drug Law Enforcement in Crisis: Cops on Steroids*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 193, 211 (2004).
[20] *Id.* at 210.
[21] Putney, *supra* note 16.
[22] *Id.*
[23] *Id.*

"muscular Christians hold [to] the old chivalrous and Christian belief, that a man's body is given him to be trained and brought into subjection, and then used for the protection of the weak, the advancement of all righteous causes, and the subduing of the earth which God has given to the children of men."[24] Soon after, the press referred to both writers and their genre of novels rife with moral principles and manly Christian heroes, as "muscular Christians."[25]

Hughes and Kingsley critiqued that Christianity, and specifically the Anglican church, had been weakened by effeminacy.[26] Society was worried that religion had become over effeminized due to increases in both male employment in white-collar jobs and female involvement in Christian churches.[27] Kingsley's work, in turn, greatly influenced the Victorian fundamentalist theologian Charles Haddon Spurgeon.[28] Through their work, the central tenet of Muscular Christianity was realized.[29] Spurgeon exerted great influence over emerging American muscular Christians, such as an evangelist and publisher D. L. Moody, and pioneer psychologist G. Stanley Hall.[30] Hall pointed to the imbalance of women to men in the pews as evidence that there existed a "woman peril" in American Protestant churches.[31] They also contended that women's influence in church had led to "an overabundance of sentimental hymns, effeminate clergymen and sickly-sweet images of Jesus."[32] Critics argued that such characteristics were revolting to "real men" and insisted that men would avoid church until feminized Protestantism gave way to Muscular Christianity.[33]

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *See* Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 848-49 (2006).
[28] Sweitzer, *supra* note 19.
[29] *Id.*
[30] *Id.*
[31] Putney, *supra* note 16.
[32] *Id.*
[33] *Id.*

Athletics, which developed "physical presence, stoic courage in the endurance of pain, and judgment under pressure," were purposefully praised as the antidote to these weaknesses by making religion a manly endeavor. [34] Based on this theory and spurred on by the moral corruption of cities during the Industrial Revolution, organized youth sports were first introduced to young boys as means of socialization and education.[35] Muscular Christianity eventually found its way into mainstream American life in the form of the Young Men's Christian Association ("YMCA") and the Boy Scouts.[36]

In fact, Spurgeon was largely responsible for introducing the YMCA to the United States.[37] The YMCA was one of the first organizations devoted to youth sports as a way to "nurture the healthy development of children … [and] strengthen families" through important social values, such as "caring, honesty, respect and responsibility" found in sports.[38] The first American branch opened in Boston in 1851; in 1866, the New York branch added a gymnasium.[39] The YMCA fostered an environment not only for the integration of sports and societal values, but also the creation of sports themselves. For example, in 1891, muscular Christian James Naismith invented basketball while studying at a YMCA in Springfield, Massachusetts.[40] Soon after, the YMCA invented volleyball and sponsored hiking, biking, baseball, and rowing clubs.[41]

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[34] Buzuvis, *supra* note 27, at 849; *see also* Mystic Seaport, *The Protestant Work Ethic*, (October 12, 2019) ("Nothing brought down the wrath of ministers and lay people quicker than the 'sin' of idleness. Honest labor could bring a person closer to God than any other world action, except of course, prayer.").

[35] *See* Jenni Spies, *Only Orphans Should Be Allowed To Play Little League:* How Parents Are Ruining Organized Youth Sports for Their Children and What Can Be Done About It, * Telephone Interview with Gary Spies, Former President, Loyalsock Township Little League, (Oct. 10, 2004).*,13 SPORTS LAW. J. 275, 276 (2006).

[36] Lisa Miller, *Manliness is Next to Godliness*, NY MAG, (Aug. 31, 2012), http://nymag.com/news/sports/tebow-sanchez/tim-tebow-christianity-2012-9/.

[37] Putney, *supra* note 16.

[38] Spies, *supra* note 35.

[39] Sweitzer, *supra* note 19, at 212-13.

[40] Miller, *supra* note 36.

[41] Putney, *supra* note 16.

In the latter half of the 20th century, advocates within the Muscular Christianity movement began boxing, viewing sports as a way to increase a man's physical and moral strength.[42] In fact, former President Theodore Roosevelt was a firm advocate of the movement out of fear that American men would lose their masculinity.[43] Roosevelt boxed throughout college and his Presidency.[44] On the sport of boxing, he once stated:

> The men who take part in these fights are as hard as nails, and it is not worthwhile to feel sentimental about their receiving punishment which as a matter of fact they do not mind. Of course, the men who look on ought to be able to stand up with the gloves, or without them, themselves; I have scant use for the type of sportsmanship which consists merely in looking on at the feats of someone else.[45]

Roosevelt viewed factors such as urbanization, sedentary office jobs, and non-Protestant immigration as threats not only to men's health and manhood but also to their privileged social standing.[46] To maintain such social standing, Roosevelt urged "old stock" Americans to embrace a "strenuous life" replete with athleticism and aggressive male behavior.[47] Accordingly, supporters urged their churches to abandon the tenets of "feminized" Protestantism.[48]

The zenith of Muscular Christianity in America lasted from about the 1880s to the early 1930s.[49] Muscular Christianity was later met with resistance from Protestant leaders, such as Harry Emerson Fosdick, who held this theological branch responsible for encouraging militarism, and satirists, such as Sinclair Lewis, who disparaged Muscular Christianity in their writings.[50] By the 1930s the Neo-Orthodoxy of Reinhold Niebuhr, who preached that divinity flourished not in

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[42] Iulia Taranu, *MMA Fighting is a Right Worthy of Protection Under the First Amendment, 6 Ariz. St. Sports & Ent. L.J. 170* (2016).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Putney, *supra* note 16.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*

men's muscles, but with God, became increasing popular in Protestant churches.[51] However, Muscular Christianity still remains a part of the Catholic Church and various Protestant and Evangelical Christian groups.[52] The Catholic Church promotes muscular Christianity in school athletic programs of schools, such as Notre Dame.[53] Other Christian groups, such as the Fellowship of Christian Athletes,[54] also still supports the combination of physical and spiritual development.[55]

The Muscular Christianity theological movement undoubtedly has had a sustained impact on how society views the relationship between sport and religion, as the intersection of the two areas give rise to constitutional challenges to this day. Today, athletes such as football's Tim Tebow,[56] basketball's Jeremy Lin,[57] baseball's Josh Hamilton, and boxer Manny Pacquiao, have all exemplified Muscular Christianity through sharing their faith with their fans.[58] The pervasive

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[51] *Id.*

[52] *Id.*; *see also* Miller, *supra* note 36 ("Groups like Promise Keepers, an Evangelical Christian parachurch organization for men since has "attempted to lure men back into the fold by emphasizing their duties as husbands and fathers—traditional "manly" roles. The group's revival meetings are often held in sports arenas.").

[53] Putney, *supra* note 16.

[54] *See Vision and Mission,* THE FELLOWSHIP OF CHRISTIAN ATHLETES, https://www.fca.org/aboutus/who-we-are/vision-mission (last visited Oct. 24, 2019) (The Fellowship of Christian Athletes is an international non-profit Christian sports ministry emphasizing faith and sports. The ministry's vision is "To see the world transformed by Jesus Christ through the influence of coaches and athletes.").

[55] Putney, *supra* note 16.

[56] Christine Thomasos, Tim Tebow Brings in a New Wave of Christian Athleticism, The Christian Post (Oct. 20, 2011), https://www.christianpost.com/news/tim-tebow-brings-in-a-new-wave-of-christian-athleticism-58871/ ("Tebow inspired a new term by ESPN, known as 'muscular Christianity.' The QB showcases his faith by wearing bible verses on his face, tweeting scriptures and publicly admitting his love for Jesus Christ, while drawing fans' attention on the football field."); *see also Tim Tebow,* Through My Eyes, (2011) ("Christians don't have to be weak, either in mind, body, or soul.").

[57] Mary Jane Dunlap, *KU professor researching Naismith, religion and basketball,* KANSAS UNIVERSITY, *(Mar. 13, 2012),* http://today.ku.edu/2012/03/13/ku-professor-researching-naismith-religion-and-basketball ("Less well-known is that his game also was meant to help build Christian character and to inculcate certain values of the muscular Christian movement. Although times have changed, there are analogies between the beliefs and activities of 19th-century sports figures such as James Naismith and Amos Alonzo Stagg, a Yale divinity student who pioneered football coaching, and those of 21st-century athletes such as Tim Tebow and Jeremy Lin.").

[58] Miller, *supra* note 36 ("The scholarly term for this theology—which is also practiced by Jeremy Lin, boxer Manny Pacquiao, and baseball's Josh Hamilton—is 'muscular Christianity,' and it can be traced back to a Victorian-era phenomenon in which elite British and American Protestants, concerned that their boys were becoming pale and flaccid singing hymns in church congregations dominated by women, promoted a version of Christianity that stressed athleticism and fortitude, cold-water swims and pre-dawn calisthenics.").

nature of Muscular Christianity has influenced athletes and coaches alike. It is only when student-athletes and coaches exercise their religious beliefs in the context of a public-school athletic contest that constitutional concerns come to the forefront. Accordingly, this conflict can be best examined through the eyes of the First Amendment's Establishment, Free Exercise, and Free Speech Clauses.

III. Constitutional Framework

A. Judicial Standards for Establishment Clause Jurisprudence

The Founding Father's purpose of the Establishment Clause was to keep church and state separate as Thomas Jefferson referred to this Clause as "building a wall between church and State."[59] To help ensure a degree of separation between church and state, a metaphoric wall has been created by the courts.[60] The Supreme Court emphasizes that this erected wall "must be kept high and impregnable."[61]

However, some relation between state and religion is inevitable. The Supreme Court recognizes that complete separation of church and state is inconceivable because "no institution [in society] can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government."[62]

The Establishment Clause[63] requires the state to be "neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions then it is to favor them."[64] Essentially, the

[59] Everson v. Bd. of Educ., 330 U.S. 1,17 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"); *see also* Reynolds v. United States, 98 U.S. 145, 162 (1879) (citing Jefferson's reply to an address by the Danbury Baptist Association).
[60] *See* Engel v. Vitale, 370 U.S. 421, 445-46 (1962) (Stewart, J., dissenting).
[61] *Everson*, 330 U.S. at 18.
[62] *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984).
[63] U.S. CONST. amend. I; *see also* Wallace v. Jaffree, 472 U.S. 38, 49-50 (1985) (imposing the limitations of the Establishment Clause on states and their political subdivisions through the Fourteenth Amendment); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 253-58 (1963) (Brennan, J., concurring) (discussion of the history of the incorporation of the Establishment Clause).
[64] *Everson*, 330 U.S. at 18.

clause prohibits government from endorsing or disapproving of specific religion or religious activity.[65] It is well-established that, at a minimum, the Constitution guarantees that the government may not coerce anyone to support or participate in religion or its exercise, or act in a way which establishes a state religion or religious faith or tends to do so.[66] Accordingly, the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.[67]

While the Supreme Court's jurisprudence includes several tests for analyzing the validity of government action under the Establishment Clause, there is no single test that has been determined to be controlling in every case. As a result, the Court's use of such various tests creates inconsistency and uncertainty in predicting the analysis and outcome of a given challenge. Despite this, the Court has expressed its refusal "to be confined to any single test or criterion in this sensitive area."[68] While the Court refuses to be confined, the underlying principle of the Establishment Clause remains the same; the clause prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."[69]

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[65] *See Lynch*, 465 U.S. at 687, 692 (O'Connor, J., concurring) (What is crucial is that a government practice does not have the effect of communicating a message of government endorsement or disapproval of religion).

[66] *See id*. at 714 (Brennan, J., dissenting) (…[i]f government is to remain scrupulously neutral in matters of religious conscience, as our Constitution requires, then it must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism toward one set of religious beliefs); *Everson*, 330 U.S. at 16-17 ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa); *see also* Santa Fe Independent School District v. Doe, 530 U.S. 302 (2000); Lee v. Weisman, 505 U.S. 577, 587 (1992).

[67] *See Lee*, 505 U.S. at 587.

[68] *See Lynch*, 465 U.S. at 679.

[69] *See* County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989); *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring) ("Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions…[t]he second and more direct infringement is government endorsement or disapproval of religion.").

In most Establishment Clause cases relating to public schools, courts have applied — either independently or in combination — the *Lemon* test, the coercion test, and the endorsement test.[70] Courts tend to view the tests as overlapping, interchangeable approaches.[71] While there has been some guidance, it is rather difficult to predict what test courts will employ in evaluating cases relating to prayer in a public-school athletic contest. On a scale from elementary school prayer to prayer opening legislative sessions, such pre-game prayer in public-school athletic contest cases will likely fall in between the two ends of the continuum. Therefore, I will briefly evaluate each test and the applicable public-school Establishment Clause cases in turn.

1. The *Lemon* Test

The three-pronged *Lemon* test has historically been the most prominent Establishment Clause test and remains instructive today.[72] However, there has been increasing criticism over the use of the *Lemon* test in analyzing Establishment Clause issues.[73]

The *Lemon* test sets forth three principles that serve as a framework that courts use when analyzing if a specific government action violates the Establishment Clause.[74] Courts have applied

[70] *See* discussion *infra* Section III.A.1-3.
[71] *See* Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003) (labeling the *Lemon* test, the coercion test, and the endorsement test as the "three traditional tests" in Establishment Clause cases).
[72] *See* Santa Fe Independent School District v. Doe, 530 U.S. 302, 314 (2000) (explicitly affirming that *Lemon* is still good law while effectively applying the "endorsement test," which slightly alters *Lemon*'s first two prongs).
[73] *See generally* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 389 (1993) (Scalia, J., concurring) ("I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the crooked lines and wavering shapes its intermittent use has produced."); *Allegheny*, 492 U.S. at 655-56 (Kennedy, J., concurring in part, dissenting in part) (noting that "[p]ersuasive criticism of Lemon has emerged"); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring) (noting that "this action once again illustrates certain difficulties inherent in the Court's use of the [Lemon] test," and that there is a "tension in the Court's use of the *Lemon* test to evaluate an Establishment Clause challenge to government efforts to accommodate the free exercise of religion."); Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (arguing that the *Lemon* test has "not provided adequate standards for deciding Establishment Clause cases."); Committee for Public Ed. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (deriding "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*.").
[74] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Lemon in many cases addressing prayer in education at various levels.[75] *Lemon* held that a school district's policy must survive a three-prong inquiry: (1) the policy must have a secular legislative purpose; (2) its principle or primary effect must be one that neither advances nor inhibits religion; and (3) the policy must not foster an excessive government entanglement with religion.[76]

The first prong of the test prompts a court to consider whether the government's action has a secular purpose.[77] This is regarded as a fairly low hurdle for the state.[78] A government action is not secular if its "actual purpose is to endorse or disapprove of" religion or a religious belief.[79] In evaluating a secular purpose, the secular purpose articulated by the legislature must be sincere and not merely a sham.[80] However, the statute need not have exclusively secular objectives.[81] Rather, the focus is on neutrality. The government only violates the "central Establishment Clause value of officially religious neutrality" when it acts with the perceived and predominant purpose of advancing religion.[82] Courts give a great deal of deference to the government's professed secular purpose.[83] Accordingly, an action that has a partially secular purpose may still pass muster.[84] For example, in the context of public education, a "moment of silence" law that was found to have been adopted for the purpose of encouraging school prayer was unconstitutional, even though a

[75] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587-92 (1992) (focusing on the coercive nature of prayer at graduation, rather than explicitly applying the *Lemon* test affirmed earlier in the opinion); *Santa Fe*, 530 U.S. at 314; *Wallace*, 472 U.S. at 55; *Mellen*, 327 F.3d at 371 (applying the *Lemon* test in addition to the principles of coercion and endorsement, when evaluating prayer at the Virginia Military Institute).
[76] *See Lemon*, 403 U.S. at 612-13.
[77] *Lemon*, 403 U.S. at 612-13.
[78] *Mellen*, 327 F.3d at 372 (quoting *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001)).
[79] *Wallace*, 472 U.S. at 56.
[80] *Id*. at 64; *see also* Bd. of Educ. v. Mergens, 496 U.S. 226, 249 (1990) ("[W]hat is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law.").
[81] *See Wallace*, 472 U.S. at 64.
[82] *See* McCreary County v. ACLU, 545 U.S. 844, 860 (2005).
[83] *See* Santa Fe Independent School District v. Doe, 530 U.S. 302, 308 (2000); *see also Mellen*, 327 F.3d at 374 ("In evaluating the constitutionality of the supper prayer…we will accord…the benefit of all doubt and credit his explanation of the prayer's purposes.").
[84] *See* Deanna N. Pihos, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 CORNELL. L. REV. 1349, 1356 (2005).

"moment of silence" law, not found to have been adopted for this purpose, would be constitutionally permissible.[85]

The second prong prompts the court to consider whether the "principal or primary effect is one that neither advances nor inhibits religion."[86] This prong evaluates whether the government favors or endorses religion or a particular religious belief regardless of the secular purpose originally professed.[87] Case law suggests that this so-called "effects" prong is of utmost significance, yet difficult to categorize.[88] While much of the government's role inevitably has some effect on religion, the Court has advised that not every law that confers an "indirect, remote, or incidental" benefit upon religion is in and of itself constitutionally invalid.[89] The Court has focused more heavily on challenges to aid to, rather than inhibition to, religion. More specifically, the Court is concerned with financial aid to religious institutions, especially religious schools,[90] and activities that communicate a message of official endorsement for particular religions or for religion in

[85] Only the amendment, which added "or prayer" to the list of what one could do during a moment of silence, was held unconstitutional. *See, e.g., Wallace*, 472 U.S. 38 (holding that a state statute that mandated a period of silence for mediation or prayer was unconstitutional); *Croft v. Governor of Tex.*, 562 F.3d 735 (5th Cir. 2009) ((holding that a state law that provides for a mandatory moment of silence to be observed in schools in which a student may, as the student chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student is constitutional); *Doe v. Sch. Bd. of Ouachita Parish*, 274 F.3d 289 (5th Cir. 2001) (a school prayer or meditation statute which had the sole purpose of returning verbal prayer in public schools was found to be unconstitutional).

[86] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[87] *See* County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989); Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[88] *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (finding that the second prong of the *Lemon* test establishes that government programs which "neutrally provide benefits to a broad class of citizens defined without reference to religion" are not readily subject to Establishment Clause challenges); *see also* Eric Nasstrom, *School Vouchers in Minnesota: Confronting the Walls Separating Church and State*, 22 WM. MITCHELL L. REV. 1065, 1084 (1996).

[89] *Lynch*, 465 U.S. at 683 (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973)).

[90] The Supreme Court has found neutral voucher and transportation programs to be constitutional. *See, e.g*., Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (holding that a school voucher program did not violate the Establishment Clause when the program is enacted for a valid secular purpose that is entirely neutral towards religion and consists of a genuine, private choice, even if the vouchers could be used for private, religious schools); Everson v. Bd. of Educ., 330 U.S. 1,18 (1947) (upholding a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and private schools, including parochial schools).

general.[91] As a result, school policies or programs that rise to an endorsement or disparagement of a particular religion violate the Establishment Clause.[92] However, neutral school policies or programs that are reinforced by a genuine, private choice may break any causal chain of a potential Establishment Clause violation.

The Supreme Court has declared unconstitutional all state-sponsored religious practices in the public schools. These include the recitation of a government-written, short, nondenominational prayer at the beginning of the school day,[93] school-sponsored Bible reading,[94] school-sponsored prayers at a school commencement,[95] and the posting of a copy of the Ten Commandments in public-school classrooms.[96] The Court has also declared unconstitutional state laws prohibiting

[91] *See, e.g.,* Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) (holding that a policy permitting student-led, student-initiated prayer at high school football games violated the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that a state statute that mandated a period of silence for mediation or prayer was unconstitutional); Lee v. Weisman, 505 U.S. 577 (1992) (holding that nonsectarian prayer at school graduation was unconstitutional).

[92] *See, e.g., Santa Fe*, 530 U.S. at 317 (holding school district's policy of allowing student to give prayer at home football games violated Establishment Clause); Epperson v. Ark., 393 U.S. 97, 106-07 (1968) (holding state practice only allowing teachers to teach creationism and prohibiting them from teaching evolutionism violated Establishment Clause because it acted as aid to Christian religion); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 407 (5th Cir. 1995) (looking at whether using religious theme song will have the effect of advancing or endorsing religion).

[93] *See* Engel v. Vitale, 370 U.S. 421, 429 (1962) (concluding that the prayers amounted to an "official stamp of approval" upon one particular kind of prayer and religious service, and said that, since teachers are agents of the federal government, the scheme violated the Establishment Clause).

[94] *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963); *see also* Roark v. South Iron R-1 Sch. Dist., 573 F.3d 556 (8th Cir. 2009) (holding that distributing Bibles during public school sessions was unconstitutional).

[95] *See Lee*, 505 U.S. at 631 (holding that an invocation and convocation during a high school graduation ceremony were unconstitutional). *But see* Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000) (holding that a graduation policy that permitted graduating students to vote on whether to have an unrestricted student led message at the beginning and close of graduation does not violate the Establishment Clause); Jones v. Clear Creek, 977 F.2d 963 (5th Cir. 1992) (upholding the constitutionality of a school district resolution that allowed senior high school students to make their own decision and vote on whether or not they wanted to allow student-led prayers at the school's graduation); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997) (finding a university's selection of a cleric or a university's decision to include nonsectarian prayer or invocation at a ceremony not to be excessive entanglement); Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998) (upholding a graduation policy that allowed student speakers to deliver a prayer or any other pronouncement); Nurre v. Whitehead, 580 F.3d 1087 (9th Cir. 2009) (finding that a graduation ceremony's prohibition of playing *Ave Maria* in an instrumental version does not violate Establishment Clause).

[96] *See* Stone v. Graham, 449 U.S. 39, 41-43 (1980) (finding that the posting of religious texts on the wall serves no such educational function).

the teaching of evolution in the public schools[97] and requiring the teaching of "creation science" where the school teaches evolution.[98]

The third and final prong of the *Lemon* test examines whether the government's action creates "excessive government entanglement with religion."[99] Courts consider "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[100] The Court has primarily expressed concern with engaging in governmental activity that fosters political divisiveness along religious lines.[101] This prong was articulated and applied by the Court in *Lemon* to hold unconstitutional a state program supplementing the salaries of parochial schoolteachers of secular subjects.[102]

It is important to note that except for the moment of silence case, which was rooted in the religious purpose prong of the *Lemon* test, all the other public-school cases focus on the religious effects prong. More recently, a federal district court found that a school district's affiliation with a religious organization such as the Fellowship of Christian Athletes, to raise money for a Christian mission trip to Guatemala to promote Christianity, failed each prong of the *Lemon* test.[103] Lastly, as will be discussed in length later, the Supreme Court has ruled that a school district's policy allowing student-initiated, student-led prayer prior to public school football games violated the Establishment Clause.[104]

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[97] *See Epperson*, 393 U.S. 97 (1968).
[98] *See* Edwards v. Aguillard, 482 U.S. 578 (1987).
[99] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[100] *Id.* at 615.
[101] *See* Wallace v. Jaffree, 472 U.S. 38, 53-55 (1985); *Lemon*, 403 U.S. at 622-24.
[102] *Lemon*, 403 U.S. at 619. *But see* Wood v. Arnold, 915 F.3d 308 (4th Cir. 2019) (holding that teaching Islam as part of a world history course in high school does not violate the Establishment Clause so long as the *Lemon* test is met).
[103] Am. Humanist Ass'n v. Douglas Cty. Sch. Dist. Re-1, 328 F. Supp. 3d 1203 (D. Colo. 2018).
[104] Santa Fe Independent School District v. Doe, 530 U.S. 290, 317 (2000) (concluding that the message was public speech authorized by government policy, taking place on government property at a government sponsored school event, which could be perceived as actual governmental endorsement of the prayer delivery at a school event).

2. The Endorsement Test

The endorsement test marginally alters the first two prongs of the *Lemon* test.[105] Rather than solely focusing on the presence of a secular purpose, the crux of the analysis is whether the governmental actions convey a message of endorsement or disapproval of religion.[106] Government may not endorse one religion over another or religion over nonreligion.[107] Accordingly, a government action that has the effect of endorsing religion, whether it intends to endorse or actually endorses a religion, violates the Establishment Clause regardless of its secular purpose.[108] Justice O'Connor further explained government endorsement of a religion as "sending a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community," ultimately leading to the very political and religious divisiveness that the Establishment Clause aims to prevent.[109]

3. The Coercion Test

Under the coercion test, if government action "coerces anyone to support or participate in religion or its exercise," the government has violated the Establishment Clause.[110] The Supreme Court has considered the nature of the activity and the practical effect the government action had on the individuals involved.[111] Prayer exercises in public schools carry a particular risk of indirect

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[105] *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (the first introduction of the Endorsement Test); County of Allegheny v. ACLU, 492 U.S. 573, 595-97 (1989); (subsequently adopting the test); *Santa Fe*, 530 U.S. at 316 (confirming an increasing focus on the endorsing nature of state-sponsored prayer in a public institution context).

[106] *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

[107] *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994).

[108] *Id.* at 691 (O'Connor, J., concurring); *see also* Engel v. Vitale, 370 U.S. 421, 429-32 (1962) (outlining the effects of government endorsement of a religion).

[109] *Kiryas Joel*, 512 U.S. at 688 (O'Connor, J., concurring).

[110] *See* Lee v. Weisman, 505 U.S. 577, 587-92 (1992) (focusing on the coercive nature of prayer at graduation, rather than explicitly applying the *Lemon* test affirmed earlier in the opinion).

[111] *Id.* at 593 (recognizing "the undeniable fact … that the school district's supervision and control of a … graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.").

coercion.[112] While the concern may not be limited to the context of public-school education, it is most pronounced there.[113] There are heightened concerns with protecting freedom of conscience from the subtle coercive pressure that may be present in elementary and secondary public schools.[114] Accordingly, due to the authoritative and influential environment of schools, the Supreme Court has relied on the coercion test in lower-level public-school prayer cases.[115] In explaining the test, the Supreme Court has suggested that the coercion test's scope of applicability may be limited to the context of elementary and secondary public schools.[116]

B. Overview of the Free Exercise Clause and Implications for Free Speech

A State "cannot hamper its citizens in the free exercise of their own religion." [117] The Free Exercise Clause protects the exercise or practice of one's religious beliefs and prohibits the government from interfering with an individual's religious practices.[118] The Supreme Court has informed that "religious beliefs need not be acceptable, logical, consistent, or comprehensible" to others in order to warrant First Amendment protection.[119] The Supreme Court has long recognized that the government may accommodate religious practices without violating the Establishment

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[112] *Id.* (stating that psychological coercion "though subtle and indirect, can be as real as any overt compulsion."); *see also Engel*, 370 U.S. at 429-32; Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).
[113] *See* County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).
[114] *See Lee*, 505 U.S. at 592 (noting that prayer in the public-school context is more likely to convey the use of the state's "machinery" to promote religion); Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003 (explaining that coercion is a consideration in the public-school context because "the expression of religious beliefs … carries the sanction and compulsion of the state's authority."); *see also Abington*, 374 U.S. at 307 (Goldberg, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 261-262 (1990) (Kennedy, J., concurring).
[115] *See* Peter E. Barber, *Bishop v. Aronov: "No Talking in Class!"; Does the Elementary School Adage Apply to University Professors?*, 44 ALA. L. REV. 211, 215 (1992).
[116] *See Lee*, 505 U.S. at 593 ("We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.").
[117] Everson v. Bd. of Educ., 330 U.S. 1,16 (1947).
[118] *See generally* Employment Div. v. Smith, 485 U.S. 660 (1990).
[119] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (quoting Thomas v. Rev. Bd. of Ind. Empl. Sec. Div., 450 U.S. 707, 714 (1981)).

Clause.[120] While the Religion Clauses often exert conflicting pressures, there is "room for play in the joints."[121] This room allows the government to accommodate religion beyond free exercise requirements and without offense to the Establishment Clause.[122] In essence, religion and government flourish because each is aware of the "corrosive perils of intrusive entanglements."[123] Therefore, in exercising restraint in infringing on each other, the beneficiaries are a "diverse populace that enjoy religious liberty in a nation that honors the sanctity of that freedom."[124]

There is a fundamental difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.[125] The intersection between the Establishment, Free Exercise, and Free Speech Clauses is highlighted in *Widmar v. Vincent*.[126] In *Widmar*, a student group sued the University of Missouri at Kansas City for the right to use state facilities for religious reasons under the free exercise and free speech clauses.[127] The University excluded a student group named "Cornerstone" from use of its buildings based on one of its regulations denying use of college facilities "for purposes of religious worship or religious teaching."[128] The Court in *Widmar* rejected the university's argument that providing a forum for religious groups had the primary effect of advancing religion, and instead held that allowing the religious groups access to the forum would not unconstitutionally "endorse" religion.[129] In affirming the circuit court, the Court first

[120] *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-145 (1987).
[121] *See* Locke v. Davey, 540 U.S. 712, 718 (2004) (quoting Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970)).
[122] *See* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).
[123] Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 355 (2d Cir. 2003).
[124] *Id.*
[125] *See* Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990).
[126] Widmar v. Vincent, 454 U.S. 263 (1981).
[127] *Id*. at 265-66.
[128] *Id*. at 266.
[129] *Id.* at 270-75.

found that the University had created an open forum for its student groups.[130] In addition to finding that First Amendment rights of speech extend to college campuses, and that religious worship and discussion are forms of protected speech, the Court determined that the University's regulation was content-based because the students were excluded due to the religious content of their intended speech.[131] In its reasoning on the Establishment Clause issue, the Court emphasized both that the open forum created by the University did not "confer any imprimatur of state approval" on religion and that the forum was open to over one hundred diverse student groups.[132] The Court held that when a state university creates an open forum for student groups to meet, the Establishment Clause neither requires nor justifies excluding religious groups from the forum.[133] The Court concluded that an equal access policy for a religious club when university facilities are open to all other student groups does not violate the Establishment Clause.[134] Therefore, if a university creates a forum generally open for use by student groups, it cannot discriminate against groups based on the content of their speech.[135]

In 1984 the Equal Access Act extended the reasoning of *Widmar* holding to public secondary schools.[136] Under the Equal Access Act, a public secondary school with a "limited open forum" is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such

[130] *Id.* at 267 (finding that that content-based discrimination against religious speech without a compelling justification existed); *see also* Chess v. Widmar, 635 F.2d 1310, 1320 (8th Cir. 1980) (reasoning that "[a] neutral accommodation of the many student groups active at UMKC would not constitute an establishment of religion even though some student groups may use the University's facilities for religious worship or religious teaching.").
[131] *Widmar*, 454 U.S. at 268-69.
[132] *Id*. at 274.
[133] *Id*. at 277.
[134] *Id.* at 263.
[135] *Id.* at 269-70.
[136] *See* Equal Access Act, 20 U.S.C. §§ 4071-74 (1988).

meetings."[137] In analyzing the constitutionality of the Equal Access Act, the Supreme Court in *Board of Education of the Westside Community School v. Mergens*[138] considered the constitutionality of student prayer groups.[139] The Court upheld the constitutionality of the Act based on its requirement that there be, "a limited open forum, the organization has to be a non-curriculum related group, and state employees can only attend in a non-participatory capacity."[140] While student clubs were encouraged, the school district prohibited clubs from having any sort of political or religious affiliation.[141] In 1985, a group of students sought instatement of a Christian student club, whose activities included reading the Bible, praying together, and having fellowship.[142] The school district denied the students' request for instatement and the students brought a claim arguing that the school district's refusal to allow the religious student group violated the Equal Access Act.[143] The school district argued that the Act violated the Establishment Clause because individual legislators were motivated by a desire to protect and promote religious speech and worship in public schools.[144] The Court rejected this argument, and instead declared that "what is relevant is the legislative purpose of the statute, not the possibly

[137] *See* 20 U.S.C.S. §§ 4071(a) and (b); *see also* 20 U.S.C.S. § 4071(b) (A "limited open forum" exists whenever a public secondary school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time); 20 U.S.C.S. § 4072(3) ("Meeting" is defined to include those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum); 20 U.S.C.S. § 4072(4). ("Noninstructional time" is defined to mean time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends); 20 U.S.C.S. § 4072(2) ("Sponsorship" means the acting of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting); 20 U.S.C.S. § 4071(c)(3) (If the meetings are religious, employees or agents of the school or government may attend only in a nonparticipatory capacity).
[138] *See* Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 235 (1990).
[139] *Id.* at 231-36.
[140] *Id.* at 233.
[141] *Id.* at 232.
[142] *Id.* at 232.
[143] *Id.* at 233 (explaining that the Equal Access Act "prohibits public secondary schools that receive federal financial assistance and that maintain a 'limited open forum' from denying 'equal access' to students who wish to meet within the forum on the basis of the content of the speech at such meetings"); *see also* 20 U.S.C. §§ 4071-4074.
[144] *Mergens*, 496 U.S. at 249.

religious motives of the legislators who enacted the law."[145] The Supreme Court applied the *Lemon* test and decided that construing the Equal Access Act to permit religious student groups does not violate the Establishment Clause because the Act has a secular purpose,[146] the Act's primary effect does not advance religion,[147] and the Act does not excessively entangle government with religion.[148] Therefore, the Court decided that the Equal Access Act did not violate the Establishment Clause and it was not unconstitutional for the school to have religious student groups.[149]

IV. Discussion

The Muscular Christianity movement has had a lasting impact on how society views the relationship between religion and sport. Its emphasis on the combination of physical and spiritual development inspired organizations and student-athletes to adopt and promulgate its central tenet — a Christian commitment to health and manliness.[150] The YMCA was founded on such principles and served as a vehicle to instill important social values in young children that may be realized through playing sports.[151] Still today, such social values are professed by professional athletes who proselytize this faith with their fans.[152] Muscular Christianity has widely influenced athletes and coaches alike in realizing the positive social values that result from an integration of

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[145] *Id*.
[146] *Id*. at 248-49 (noting that "because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to 'endorse or disapprove of religion.'"); *see also* Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Lynch v. Donnelly, 465 U.S. 668, 690 (1984).
[147] *Mergens*, 496 U.S. at 250-52 (noting that high school students are unlikely to "confuse an equal access policy with state sponsorship of religion;" declaring that "[t]here is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate. . . . To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion.").
[148] *Id*. at 252-53 (finding that school officials cannot lead or promote any religious exercises and being that the proposed religious student group was to have no teacher or faculty advisor, the policy did not violate this restriction).
[149] *Id.* at 253.
[150] *See* Putney, *supra* note 16.
[151] *See* Spies, *supra* note 35.
[152] *See* Thomasos *supra* note 56 and accompanying text.

sport and religion. However, its pervasive nature is also its Achilles heel, especially in the context of public-school education. An aspect of public-school education that often gives rise to heightened concern is religious devotional prayer.[153] Such concerns may arise where student-athletes or public-school administration, such as teachers and coaches, seek to participate in student-led religious activity like pre-game team prayer.[154] Subsequent challenges to these concerns usually highlight the play in the joints that exist between the Religion Clauses.[155]

A. Student-Initiated/Led Prayer

In non-public forums consisting of substantial public-school involvement in regulating school prayer through policy implementation, courts are likely to find that such involvement exceeds constitutional limits and violates the Establishment Clause. The Supreme Court addressed student-led prayer at high school football games in *Santa Fe Independent School District v. Doe*.[156] In *Santa Fe*, the Court held that a Texas public high school policy that authorized a student election, the winner of which would lead a prayer at school football games, violated the Establishment Clause.[157] The policy, initially entitled "Prayer at Football Games,"[158] permitted students to cast

[153] *See, e.g.,* Santa Fe Independent School District v. Doe, 530 U.S. 290, 317 (2000) (holding that a policy permitting student-led, student-initiated prayer at high school football games violated the Establishment Clause); Lee v. Weisman, 505 U.S. 577, 631 (1992) (holding that prayer at a public middle school graduation violated the Establishment Clause); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (holding that the practice of hiring a chaplain to hold prayer at a state legislative session did not violate the Establishment Clause because of the country's unique history); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963) (holding that school-sponsored Bible reading in public schools violates the Establishment Clause); Engel v. Vitale, 370 U.S. 421, 423 (1962) (holding that that reciting government-written prayers in public school classrooms violated the Establishment Clause).

[154] *See* Borden v. Sch. Dist., 523 F.3d 153 (3d Cir. 2008) (holding that coach's acts of participating in pre-game grace and pre-game prayer constitutes of violation of the Establishment Clause).

[155] *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that a moment of silence in public schools for meditation or voluntary prayer violated the Establishment Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (holding the release of students from public school for religious instruction did not violate the Establishment Clause so long as the instruction takes place away from the school campus, for one hour per week, and with no public funding); People ex rel McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (holding that religious instruction in public schools violates the Establishment Clause); Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972) (holding that regulations that required chapel attendance by cadets and midshipmen at federal military academies were invalid under the Establishment Clause).

[156] *Santa Fe*, 530 U.S. 290 (relying heavily upon *Lee*).

[157] *Id.* at 317.

[158] *Id.* at 297-98. As litigation was proceeding through the federal judicial system, the policy name was changed to omit the word "prayer." However, a further election was not conducted to sanction this amended policy.

votes regarding two issues: (1) whether a student would deliver an "invocation and/or message" at football games; and (2) which student would deliver said message.[159] The policy would allow a student to use the public address system to express the invocations.[160] The students had voted affirmatively to allow the student-led invocations.[161] Subsequently, some students filed suit against the school district for permitting prayer before the football games.[162]

The Court found that the school district's actions unequivocally fostered perceived and actual endorsement of religion for two main reasons.[163] First, the pre-football invocations were given by a student who held the school-elected position of student council chaplain.[164] While the school district argued that because the prayers were student-initiated and student-led, the prayers constituted private speech protected by the Free Exercise Clause, the Court concluded that the school district unsuccessfully attempted to disentangle itself from religious speech through the two-step student election process; in fact, the election itself was conducted because the board *chose to permit* student-led prayer.[165] Second, the Court found that the invocations were authorized by the school and took place on government property at a government-sponsored school-related event.[166] The Court found that the school district's policy allowing the student council chaplain to give an invocation at the beginning of each home football was "invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school

[159] *Id*. at 311.
[160] *Id.* at 306.
[161] *Id.* at 297-98.
[162] *Id.* at 294.
[163] *Id.* at 308.
[164] *Id.* at 309.
[165] *Id.* at 302-06.
[166] *Id.* at 303.

events."[167] The court reasoned that the school district's elections were "insufficient safeguards of diverse student speech because fundamental rights may not be submitted to vote."[168] Moreover, the Court held that the plain language of the policy, which used words such as "solemnize" and "invocation" revealed that it had an unconstitutional purpose.[169] The speech allowed under the policy could not truly be "private speech" because the policy highlighted "invocations," defined by the Court as "primarily … an appeal for divine assistance."[170] Therefore, the Court found that, given the policy's text and history, such invocations were not private student speech, but rather public speech because an objective Santa Fe High School student would perceive the pregame prayer as stamped with the school's seal of approval.[171]

With a particular emphasis on the intersection of speech and the Religion Clauses, the Court stated that not all speech given in government forums constitutes government-sponsored speech, particularly when the government has created an open forum or limited public forum for individual free speech.[172] However, the Court found that the policy did not establish a limited public forum for "private speech."[173] Because the school authorized the election and the speech took place on school property at school events, the Court held that the speech was government-endorsed, rather than purely private speech. [174] The majority opinion stated:

> The delivery of such a message — over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and

[167] *Id.* at 304, 317 (finding that the student majoritarian election process "guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.").
[168] *Id*. at 305.
[169] *Id.* at 306-07, 314 (reasoning that "the expressed purposes of the policy encourage the selection of a religious message.").
[170] *Id*. at 306-07.
[171] *Id.* at 308.
[172] *Id.*; *see also* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 894-95 (1995) (finding that an individual's contribution to a government-created forum, such as a person stating their opinion at a government-sponsored public debate, did not constitute government sponsored speech).
[173] Santa Fe Independent School District v. Doe, 530 U.S. 290, 316 n.23 (2000).
[174] *Id.* at 302-03.

> pursuant to a school policy that explicitly and implicitly encourages public prayer — is not properly characterized as "private speech."[175]

Therefore, while the speech was ultimately delivered by a student, the school's endorsement of the speech made it government speech for purposes of the Establishment Clause.[176] Moreover, the Court found that it was not the intention of the school district to create a public forum for voluntary student speech as the policy did not evidence either "by policy or by practice, any intent to open the [pregame ceremony] to indiscriminate use, . . . by the student body generally."[177] Furthermore, the Court emphasized that the degree of school involvement in the prayer process made it clear that the invocations bear the imprint of the state and put the school-age children who objected in an untenable position.[178] The court was persuaded that "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship."[179] Therefore, the Court found that any religious message resulting from the policy would be attributable to the school and not just to the student.[180] Accordingly, the Court held that the enactment of the policy, "with the purpose and perception of school endorsement of student prayer," was a constitutional violation.[181]

Remarkably, the Court stated that, "Of course, not every message delivered under such circumstances is the government's own."[182] In fact, the Court recognized broad protection for voluntary student prayer in public schools as it did not hold that a school district can never create

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[175] *Id.* at 310-312 ("Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.").
[176] *Id.*
[177] *Id.* at 303 n.13 ("A conclusion that the District had created a public forum would help shed light on whether speech is public or private.").
[178] *Id.* at 305. Additionally, the Court found that students feel social pressure to attend extracurricular activities, such as American high school football games.
[179] *Id.* at 312.
[180] *Id.* at 311.
[181] *Id.* at 316.
[182] *Id.* at 302.

a limited public forum for "private" student speech. Significantly, the Court concluded that nothing in the Constitution as interpreted by the Court prohibits any public-school student from voluntarily praying before, during, or after the school day; the religious freedom is only infringed upon, as it was by the school district's policy in *Santa Fe*, when the State affirmatively sponsors the particular religious practice of prayer.[183]

B. Coach Initiated/Led Prayer

The Federal Court of Appeals for the Fifth Circuit considered the constitutional limits of coach led prayer in public-school athletics in *Doe v. Duncanville Independent School District*.[184] In 1988, Doe was enrolled as a seventh-grade student who qualified for the girls' basketball team.[185] The coach included the Lord's Prayer in each basketball practice and the team said prayers in the locker rooms before games began, after games in the center of the basketball court in front of spectators, and on the school bus travelling to and from games.[186] The coach initiated or participated in these prayers as had been a tradition for almost twenty years.[187] Doe initially participated in the prayers so she would fit in with her teammates, but then decided not to participate.[188] Her lack of participation attracted attention from her peers and spectators as well as a teacher who referred to Doe as a "little atheist."[189]

Doe filed an application for a restraining order and a preliminary injunction forbidding the school from allowing its employees from "leading, encouraging, promoting, or participating in

[183] *Id.* at 313.
[184] Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995).
[185] *Id.* at 404.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*

prayer with or among students during curricular or extra-curricular activities, including sporting events."[190] The district court enjoined the school district, its employees and its agents from

> leading, encouraging, promoting, or participating in prayers with or among students during curricular or extracurricular activities, including before, during, or after school-related sporting events. Students, however, are not enjoined from praying, either individually or in groups. Students may voluntarily pray together, provided such prayer is not done with school participation or supervision.[191]

In its analysis, the appellate court explained the Establishment Clause's limits on a coach's free exercise. With regard to employee participation in prayer, the school district contended that it cannot prevent its employees from participating in student prayers without violating their employees' rights to the free exercise of religion, free speech, freedom of association, and academic freedom.[192] The court disagreed with the school district's argument and upheld the district court's prohibition.[193] It noted that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[194] The court found this "particularly true in the . . . context of basketball practices and games."[195] The court reasoned that the prayers took place during school-controlled, curriculum-related activities that members of the team were required to attend.[196] Because coaches and other school employees are representative of the school and its policies, the coach's prayers improperly entangled the school district in religion and indicated an unconstitutional endorsement of

[190] *Id.* at 405.
[191] *Id.* at 405-06.
[192] *Id.* at 406.
[193] *Id.*
[194] *Id.; see also* Lee v. Weisman, 505 U.S. 577, 586-87 (1992).
[195] *Doe*, 70 F.3d at 406.
[196] *Id.*

religion.[197] Accordingly, the court found that the school district's employees and agents were properly enjoined from participating in student-initiated prayers.[198]

In contrast to the approach by the Federal Court of Appeals for the Fifth Circuit, which focused on how a coach's prayers may improperly entangle a school district in religion, the Federal Court of Appeals for the Third Circuit focused on how a coach's prayers may cause a reasonable observer to perceive it as an endorsement of religion in *Borden v. School District of the Township of East Brunswick.*[199] In 2008, a football coach, Marcus Borden, sued his school district, claiming that the district's prohibition of faculty and coaches participating in prayer violated his rights to free speech, academic freedom, freedom of association, and due process.[200] Borden was the head football coach at East Brunswick High School.[201] During his time as head coach, he led the team in prayer before games and at the weekly team dinner where players, parents, and cheerleaders were present.[202] From 2003-2005, Borden led the prayer at the first team dinner of every season and then selected a senior player to do so in the subsequent weeks.[203] Additionally, Borden would ask the assistant coaches and players to take a knee as he led them in prayer before each game.[204]

In 2005, parents complained to the Superintendent about the prayer at the team dinner; one player even indicated that he was uncomfortable and afraid that Borden would call on

[197] *Id.; see also* Bishop v. Aronov, 926 F.2d 1066, 1073 (11th Cir.1991) ("[a] teacher's [religious] speech can be taken as directly and deliberately representative of the school"); Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 251 (1990) (quoting Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (EAA valid because it expressly forbids teacher participation and "avoids the problems of "the students' emulation of teachers as role models.'").
[198] *Doe*, 70 F.3d at 405-06.
[199] Borden v. School District of the Township of East Brunswick, 523 F.3d 153 (3d Cir. 2008).
[200] *Id.* at 158-59.
[201] *Id.* at 159.
[202] *Id.* Note that before Borden's arrival, the prayers at the team dinners were led by a local minister.
[203] *Id.*
[204] *Id.*

him to lead the prayer.[205] In a memo to Borden and all faculty members, the Superintendent reminded all faculty and staff that students have a constitutionally protected right to pray at school so long as it did not interfere with the "normal operations of the school or district."[206] However, the Superintendent noted, representatives of the school or school district (teachers, coaches, administrators, board members, etc.) "were prohibited from encourag[ing,] lead[ing,] initiat[ing,] mandat[ing,] or otherwise coercing student prayer, either directly or indirectly," during school time or at any school sponsored event.[207] Borden temporarily resigned but soon after returned and filed suit against the district.[208] Prior to the commencement of the 2006 football season, Borden asked his team captains to talk to all of the members of the team to determine if they wanted to continue prayer before team dinners and games.[209] The team voted to continue the pre-meal and pre-game prayers.[210] Accordingly, while Borden no longer led his players in prayer, he continued to bow his head before team meals and take a knee before each game.[211]

First, the Third Circuit Court of Appeals considered the limitations of the First Amendment for coaches and other public-school employees. The court stated, "The day has long since passed when individuals surrendered their right to freedom of speech by accepting public employment."[212] However, such rights are not without limitation. Borden argued that his speech (bowing his head and taking a knee) was protected by the First

[205] *Id.* at 159-60.
[206] *Id.*
[207] *Id.* at 160-61.
[208] *Id.* at 162.
[209] *Id.*
[210] *Id.*
[211] *Id.* at 162. Note that because Borden discontinued other acts of religious expression with players, the court here considered only Borden's acts of bowing his head and taking a knee.
[212] *Id.* at 168 (quoting Sanguini v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393, 396 (3d Cir. 1992)).

Amendment's freedoms, including freedom of speech.[213] However, the court concluded that the coach's speech was not protected speech.[214] Rather, the court concluded that Borden's conduct violated the Establishment Clause using the Endorsement Test.[215] In reaching their conclusion the court looked to how a reasonable observer familiar with the history and context of the religious display would perceive Borden's actions.[216] The court evaluated not only Borden's bowing of his head before pre-game meals and taking a knee in the locker room, but also considered Borden's lengthy history of engaging in religious activities with the team.[217] The court found that his involvement as "an organizer, participant, and a leader . . . would lead a reasonable observer to conclude that he was endorsing religion."[218] However, the court noted that "[w]ithout Borden's twenty-three years of organizing, participating in, and leading prayer with his team, this conclusion would not be so clear… ."[219] Despite ruling against Borden, the Third Circuit contemplated that a circumstance in which a coach bowing his head or taking a knee out of respect during a time of student-initiated prayer may not violate the Establishment Clause. The court went on to state:

> If a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present.[220]

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[213] *Id.* at 163.
[214] *Id.* at 171. The court concluded that that Borden's speech was not a matter of public concern because it occurred in private settings, such as the pre-game dinner and locker room and it was intended for the football players (and their parents) only. Also, the speech was not protected under academic freedom because his speech was intended to be a pedagogic method, rendering him a "proxy" for the school district.
[215] *Id.* at 175 (finding it unnecessary to analyze Borden's actions using the coercion test or the *Lemon* test because his conduct obviously violated the Establishment Clause using the endorsement test).
[216] *Id.* (citing Modrovich v. Allegheny Cty., Pa., 385 F.3d 397, 401 (3d Cir. 2004)).
[217] *Id.* at 176-77.
[218] *Id.* at 176.
[219] *Id.* at 178.
[220] *Id.* at 178-79.

Next, the court considered whether the school district had the right to adopt the prayer policies in an effort to avoid violating the Establishment Clause. The court found that the school district's guidelines and prayer policies were not facially unconstitutional and did not violate Borden's constitutional rights.[221] The court reiterated that it has held that where an official at a public school does not have a First Amendment right to his or her expression, the school district's policy need not be "reasonably related to a legitimate educational interest."[222] Thus, because Borden had no First Amendment right to his expression, the Court needed not to analyze the policy under that standard.[223] Nevertheless, it chose to go through with the analysis to demonstrate that the school district had a right to adopt its policy because it has a legitimate educational interest of avoiding Establishment Clause violations and that the prayer policy guidelines were reasonably related to that interest.[224] The Supreme Court has stated that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."[225]

C. Silent Prayer in Public School Policy

[221] *Id.* at 165-66.

[222] *Id.* at 174 (citing Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998)). Note that the court determined that this analysis was unnecessary since the policy was not unconstitutional on its face and did not violate Borden's fundamental rights. Nevertheless, it chose to go through with the analysis to demonstrate that the school district has a legitimate educational interest of avoiding Establishment Clause violations and that the prayer policy guidelines were reasonably related to that interest. *See also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 841-42 (1995) (stating that, in considering pre-emptive regulations, the state must have a "plausible fear" of being associated with religion or a particular religion, and there must be a "likelihood that the speech in question is being either endorsed or coerced by the State."); Tucker v. Cal. Dept. of Educ., 97 F.3d 1204, 1213 (9th Cir. 1996) (holding that a blanket ban on all employee religious speech or expression went beyond what was necessary to protect the State from Establishment Clause violations because "[t]he challenged regulation here prohibits all sorts of employee speech that could in no way create the impression that the state has taken a position in support of a religious sect or of religion generally.").

[223] Borden v. School District of the Township of East Brunswick, 523 F.3d at 174.

[224] *Id.* at 761-62.

[225] *Id.* at 761-62 (citing Capitol Square Review and Advisory Board v. Pinette, 515 U.S. at 761-62; *see also* Locke v. Davey, 540 U.S. 712, 729 (2004) (Scalia, J., dissenting) ("[a] State has a compelling interest in not committing *actual* Establishment Clause violations.").

Silent prayers adopted by the students themselves or implemented by the state for secular purposes can cultivate an environment where voluntary, uncoerced, individualized reflection prior to the start of public-school athletic contests can thrive in locker rooms and on sidelines. Silent prayers that are sponsored by the government, however, can still violate the Establishment Clause.

In *Wallace v. Jaffree*, the Supreme Court held that an Alabama Statute which authorized a one minute period of silence in all public schools "for meditation or voluntary prayer" was a law respecting the establishment of religion.[226] The Court stated that "[a] system which secures the right to proselytize religions, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."[227] The Court instructed that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."[228] The Court cited two reasons to justify its finding of no secular purpose. First, the law replaced an earlier moment-of-silence law that had not mentioned prayer; because that earlier law already protected the right to pray (without saying so), the purpose of the later law had to be to "endorse" and "promote" prayer.[229] Second, the majority also relied on statements by the law's sponsor, State Senator Donald Holmes, that the law's purpose was to return voluntary prayer to the public schools.[230] Thus, the statute was struck down because it did not have a secular purpose and the motivation for passing the statute was to advance religion.[231] To be a valid moment of silence, the practice has

[226] *See* Wallace v. Jaffree, 472 U.S. 38, 61 (1985).
[227] *Id.* at 51.
[228] *Id.* at 60.
[229] *Id.* at 59.
[230] *Id.* at 57. *But see id*. at 86 (Burger, C.J., dissenting) (Holmes' statements were made after the law was enacted, a fact the majority failed to mention).
[231] *Id.* at 56-7.

to be adopted with purely secular intentions.[232] While the statute in *Wallace* could not withstand scrutiny based upon an analysis of the actual statutory language, the reason behind the statute, or its practice, members of the Court appear to have agreed that properly implemented moment of-silence laws could be constitutional.[233]

V. Solution: A Properly Implemented Moment of Silence Policy in Public School

The Muscular Christianity movement left an indelible impact on the relationship between sport and religion. Its pervasive influence inspires the religious spirit of student-athletes and coaches while challenging the extent to which religious devotional prayer should be permitted in public-school athletic contests. As can be derived from caselaw and modern-day controversies that surround religious devotional prayer in public-school athletic contests, anything less than a properly implemented moment of silence policy would require strict adherence to the First Amendment.

Coach-initiated prayer, student-initiated prayer, and government endorsed prayer policies highlight the conflicts of the Establishment, Free Exercise, and Free Speech Clauses in the context of public-school athletic contests. Regarding coach-initiated prayer, a coach's initiation of or participation in prayer may improperly entangle the school district in religion and indicate an unconstitutional endorsement of religion because coaches are viewed as representatives of the

[232] *Id.* at 67 (O'Connor, J., concurring).

[233] *See id*. at 59 ("The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday."); *Id.* at 62 (Powell, J., concurring) ("[s]ome moment-of-silence statutes may be constitutional."); *Id.* at 72-73 (O'Connor, J., concurring) ("Scholars and at least one Member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional."); *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 281 (1963); (Brennan, J., concurring) ("[T]he observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.").

school and its policies.[234] Regarding student-initiated prayer, the Supreme Court has recognized broad protection for voluntary student prayer in public schools. In *Santa Fe,* the student-athlete's religious freedom is only infringed upon, as it was by the school district's policy, when the State affirmatively sponsors the particular religious practice of prayer.[235] Moreover, a school policy addressing prayer in public-school athletic contests that is improperly implemented may prevent a student-athlete's ability to freely exercise their right to pray or, conversely, may impose mandatory prayer on a nonreligious student-athlete. In each scenario, a government or government actor's involvement can deprive coaches and student-athletes of the genuine, meaningful choice of whether to engage in religious devotional prayer. However, in reconciling the above, there is a solution that would simultaneously achieve both free exercise and non-establishment of religion. In *Santa Fe,* the Court did not hold that a school district can never create a limited public forum for "private" student speech; the Court concluded that nothing in the Constitution as interpreted by the Court prohibits any public-school student from voluntarily praying before, during, or after the school day.[236] To this end, the Supreme Court appears to have also agreed that properly implemented moment of silence policies and laws could be constitutional in the public-school context.[237] Therefore, a properly implemented moment of silence policy in public schools is the solution to simultaneously achieve both free exercise and non-establishment of religion.

The most constitutionally permissible approach to allowing prayer in locker rooms and on sidelines would be for a public-school district to properly implement a moment of silence policy. This moment of silence policy would be a voluntary, uncoerced, and neutral policy implemented

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[234] *See* Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406 (5th Cir. 1995); s*ee also* Bishop v. Aronov, 926 F.2d 1066, 1073 (11th Cir.1991) ("[A] teacher's [religious] speech can be taken as directly and deliberately representative of the school."); Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 251 (1990).
[235] *See* Santa Fe Independent School District v. Doe, 530 U.S. 290, 313 (2000).
[236] *Id.*
[237] *See supra* note 233 and accompanying text.

for the secular purpose of furthering individualized reflection prior to the start of public-school athletic contests. A school policy that permits a moment of silence means that individuals can pray in the locker rooms and on the sidelines without compromising one's free exercise of religion, jeopardizing the religious liberties of others, or disrespecting the required degree of separation between church and state. Accordingly, such school policy would neither impinge on a student-athlete's rights to make the choice to pray nor curtail a coach's right to effectively motivate his or her team. The practice of reflecting, meditating, and praying are each products of a genuine, private choice. Particularly, a school policy permitting a moment of silence to be observed before an athletic contest in which a student may, if the student chooses, reflect, pray, or meditate, allows a student to make a genuine, private choice — to reflect and "get in the zone" however they may choose to do so, or not to do so, at all. If a coach or student-athlete opts to use that moment of silence to pray, then that is their genuine, private choice. Accordingly, properly implemented "moment of silence" policies are effective because coaches and student-athletes will not know whether their peers use the silent moment for inner reflection, meditation, or prayer.

VI. Conclusion

A government's denial of prayer is just as unconstitutional as a government's endorsement of prayer. Just as there is room for play in the joints between the Religion Clauses, there is room to achieve constitutionality in the incorporation of religious devotional prayer in public-school athletic contests. Both free exercise and non-establishment can be achieved through a properly implemented moment of silence. Such moment of silence would be voluntary, uncoerced, and neutral for the secular purpose of furthering individualized reflection prior to the start of public-school athletic contests.

Firstly, this practice would not violate the Free Exercise Clause. The practice of reflecting, meditating, and praying are each products of a genuine, private choice. Therefore, a school policy permitting a moment of silence to be observed before an athletic contest in which a coach or student-athlete may, as they choose, reflect, pray, or meditate, allows a coach or student-athlete to make a genuine, private choice — to reflect and "get in the zone" however they may choose to do so, or not to do so, at all. If a coach or student-athlete opts to use that moment of silence to pray, then that is their genuine, private choice. Such a policy would neither impinge on a student-athlete's rights to make the choice to pray nor curtail a coach's right to effectively motivate his or her team.

Secondly, this practice would not violate the Establishment Clause. A school policy permitting a moment of silence to be observed before an athletic contest cannot be misconstrued as endorsing or advancing a particular religious practice. The purpose of a moment of silence policy is secular and neutral in nature; the purpose is to further individualized reflection prior to the start of public-school athletic contests. The moment allows a student-athlete to make a genuine, private choice as to how he or she will use that time, and the student may or may not use that time to pray. Therefore, a moment of silence policy reinforced by a secular purpose and a genuine, private choice breaks any causal chain of a potential Establishment Clause violation.

In conclusion, a properly implemented moment of silence policy in public schools may be the ultimate "Hail Mary" that is needed to achieve constitutionality of prayer in the modern-day pews that are sidelines and locker rooms.